IN THE

Supreme Court of the United States

October Term, 1960

No. 34

TIMES FILM CORPORATION,

Petitioner,

against

CITY OF CHICAGO, RICHARD J. DALEY and TIMOTHY J. O'CONNOR,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF MOTION FOR REHEARING (OF DECISION OF THIS COURT SUSTAINING CONSTITUTIONALITY OF SEC. 155-4 OF THE MUNICIPAL CODE OF THE CITY OF CHICAGO) AND REVERSAL AND BRIEF AS *AMICUS CURIAE*

HORACE S. MANGES,
Attorney for American Book Publishers Council, Inc.,
60 East 42nd Street,
New York 17, N. Y.

HORACE S. MANGES,
JACOB F. RASKIN,
of Counsel.

INDEX

Table of Cases Cited

IN THE

Supreme Court of the United States

October Term, 1960

No. 34

TIMES FILM CORPORATION,

Petitioner.

against

CITY OF CHICAGO, RICHARD J. DALEY and TIMOTHY J. O'CONNOR,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF MOTION FOR REHEARING (OF DECISION OF THIS COURT SUSTAINING CONSTITUTIONALITY OF SEC. 155-4 OF THE MUNICIPAL CODE OF THE CITY OF CHICAGO) AND REVERSAL AND BRIEF AS *AMICUS CURIAE*

American Book Publishers Council, Inc. hereby respectfully moves for leave to file the brief appended hereto as *amicus curiae* in support of the motion for rehearing by this Court of its decision sustaining the constitutionality of Sec. 155-4 of the Municipal Code of the City of Chicago. The consent of the attorney for the petitioner has been obtained. On February 3, 1961, movant sent a telegram to the attorney for respondent, a copy of which is appended below. No response to that telegram has been received.

American Book Publishers Council, Inc. is a membership corporation of which the leading publishers of books in general circulation and the leading university presses are members. It is estimated that the 162 members of the Council publish and distribute over 90% of all general books. Among these publishers are Doubleday & Company,

The Macmillan Company, McGraw-Hill Book Company, Charles Scribner's Sons, Harper & Brothers, Grosset & Dunlap, Inc., Little Brown & Co., Random House, Inc., The Viking Press, and Alfred A. Knopf, Inc.; among the university presses are those of Harvard, Yale, Princeton, Columbia, North Carolina, Texas, Minnesota, Oklahoma and Stanford.

Although the members of the Council are not directly concerned with the exhibition of motion pictures, they have a vital interest in the constitutional issue involved in this case because they believe, as stated by Mr. Chief Justice Warren, that the decision of this Court "presents a real danger of eventual censorship for every form of communication be it newspapers, journals, books, magazines, television, radio or public speeches." It is believed that the brief here appended presents in broader perspective the dangerous impact of the decision of this Court upon the public in general than will be presented by the parties themselves on this motion for rehearing.

WHEREFORE, it is respectfully urged that American Book Publishers Council, Inc. be granted leave to file herewith the appended brief as *amicus curiae*.

Respectfully submitted,

HORACE S. MANGES,
Attorney for American Book Publishers Council, Inc.,
60 East 42nd Street,
New York 17, N. Y.

Appendix A

New York N. Y.
February 3, 1961

HON. JOHN C. MELANIPHY.
CORPORATION COUNSEL
CITY OF CHICAGO
ILLINOIS

I AM COUNSEL TO AMERICAN BOOK PUBLISHERS COUNCIL CONSISTING OF ONE HUNDRED SIXTY-ONE OF THE LEADING BOOK PUBLISHERS AND UNIVERSITY PRESSES. I EARNESTLY REQUEST YOUR CONSENT IN CONNECTION WITH MOTION FOR REHEARING TO FILING A BRIEF AMICUS CURIAE FOR REVERSAL OF DECISION OF THE SUPREME COURT IN TIMES FILM CORPORATION V. CITY OF CHICAGO. KINDLY WIRE REPLY COLLECT.

HORACE S. MANGES
60 East 42nd Street

IN THE

Supreme Court of the United States

October Term, 1960

No. 34

TIMES FILM CORPORATION,

Petitioner,

against

CITY OF CHICAGO, RICHARD J. DALEY and TIMOTHY J. O'CONNOR,

Respondents.

BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS *AMICUS CURIAE*

Interest of American Book Publishers Council, Inc.

American Book Publishers Council, Inc. is a membership corporation composed of most of the leading publishers of books of general circulation and university presses. It is estimated that the 162 members of the Council publish and distribute over 90% of all general books. Among these publishers are Doubleday & Company, The Macmillan Company, McGraw-Hill Book Company, Charles Scribner's Sons, Harper & Brothers, Grosset & Dunlap, Inc., Little Brown & Co., Random House, Inc., The Viking Press, and Alfred A. Knopf, Inc.; among the university presses are those of Harvard, Yale, Princeton, Columbia, North Carolina, Texas, Minnesota, Oklahoma and Stanford.

Although the members of the Council are not directly concerned with the exhibition of motion pictures, they have a vital interest in the constitutional issue involved in this case.

Argument

The fact that four Justices of this Court have expressed fear that this decision "presents a real danger of eventual censorship for every form of communication be it newspapers, journals, books, magazines, television, radio or public speeches" is indicative of the devastating possibility that such fear may become widespead and may well tend to inhibit constitutionally protected expression and retard investment of capital and other forms of expansion and development in these vital communications media. This same concept was well expressed in an editorial comment on the Court's decision in this case in "The Commonweal", issue of February 10th, as follows:

> "The argument that movies are somehow 'specially censorable'—even though prior censorship of all other media is unconstitutional—we find unconvincing. The mass audience, the vividness of the communication, the tender age of those exposed to movies—all these conditions are met, to a greater or lesser degree, by other forms of modern communication. As the minority opinion asked, why should movies be singled out for government censorship by a society which fears and abhors state-controlled press or radio or communications systems generally?" (p. 496)

Unfortunately, the public becomes a major sufferer when timidity is encouraged in the field of communications media.

We respectfully ask this Court to re-examine the situation and determine whether the protection of the public contemplated by this decision cannot be achieved without the necessity of subjecting the public to this very real risk of depriving it of access to constitutionally protected expression in every medium of communication.

We call attention of this Court, as did the minority, to the Court's own decision in *Shelton* v. *Tucker*, — U. S. —, where Mr. Justice Stewart said:

> "* * * even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

We urge most emphatically that pre-publication censorship is not necessary for the protection of the public against the danger of dissemination of obscenity. The very fact that only four states and fifteen municipalities have adopted laws similar to the Chicago ordinance is more than clear indication that pre-publication censorship is not necessary for the protection of the public. We submit that such protection can be and is adequately safeguarded by existing statutes prohibiting the exhibition of obscene motion pictures and the sale of obscene publications; and that therefore to permit such prior restraint would constitute an unwarranted encroachment on freedom of speech and press.

Basic to the protection of freedom of speech and press is the doctrine so aptly expressed by this Court in *Near* v. *Minnesota*, 283 U. S. 697, 716:

> "The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally, although not exclusively, immunity from previous restraints or censorship."

While it is true that in the same case the Court stated that the protection as to previous restraint is "not absolutely unlimited," it nevertheless also made this important observation:

> "But the limitation has been recognized only in the exceptional cases." (p. 716)

Although one of the exceptions noted in *Near* related to enforcing the "primary requirements of decency" against

obscene publications, it is significant that in *Roth* v. *United States*, 354 U. S. 476, 488, this Court said, by way of limitation of such exception:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

A basic question here is whether the door is being left ajar by permitting *pre-publication censorship through an administrative official*, by way of a licensing statute, such as the Chicago ordinance.

We submit that loud and significant affirmative answers to that question have already been given by this Court. We refer specifically to two statements which it has made. The first of these appears in *Near* v. *Minnesota, supra*:

> "Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." (p. 720)

The second such statement, to which reference is made, is that of Mr. Justice Frankfurter in *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 441, where he stated for the Court:

> "* * * the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship."

That statement was quoted by Mr. Chief Justice Warren in the dissenting opinion herein.

As a matter of fact, in *Kingsley Books, Inc.* v. *Brown, supra*, this Court, in sustaining the constitutionality of the

New York law permitting certain officials to institute an action to enjoin the distribution of obscene material, pointed out that the New York statute made provision for "adequate notice, judicial hearing and fair determination" which constituted "a safeguard against frustration of the public interest in effectuating judicial condemnation of obscene material" (p. 440).

And, in differentiating *Kingsley* from *Near* v. *Minnesota*, *supra*, Mr. Justice Frankfurter, writing for this Court, said, at p. 445:

> "Unlike Near, Section 22-a is concerned solely with obscenity and, as authoritatively construed, it studiously withholds restraint upon matters not already published and not yet found to be offensive."

In condemnation of the radically different type of censorship statute—such as here present—we refer to the following comment of Mr. Justice Clark in *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, 503:

> "The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection."

We urge most respectfully that in sustaining the constitutionality of pre-publication censorship, this Court dis-

regarded its own admonition stated in *Roth* that the door barring intrusion into the fundamental freedoms of speech and press "must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." Indeed, such pre-publication censorship, in the light of the existing statutes prohibiting the dissemination of publications which may be constitutionally suppressed, not only is not necessary "to prevent encroachment upon more important interests" but, actually, such pre-publication censorship itself encroaches upon the public's right of access to constitutionally permissible expression.

This much is clear—an erroneous denial of a license by an administrative official would violate the constitutional rights not only of the license applicant, but of the public. Not every applicant would be willing to assume the burden and incur the expense of a protracted litigation to establish that he was erroneously denied a license, and there would thus be suppression prior to publication without a judicial determination, in accordance with the requirements of due process of law, that the material may be constitutionally suppressed. Such suppression would affect not only the license applicant. The public, as well, would be denied access to the unconstitutionally suppressed material. It was such tendency "to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly" which led this Court to strike down the ordinance involved in *Smith* v. *California*, 361 U. S. 147, 154.

CONCLUSION

For the reasons hereinabove set forth, we respectfully urge that the motion for a rehearing be granted, and that upon such rehearing this Court adjudge unconstitutional Section 155-4 of the Municipal Code of the City of Chicago.

Respectfully submitted,

HORACE S. MANGES,
Attorney for American Book Publishers Council, Inc.,
60 East 42nd Street,
New York 17, N. Y.

HORACE S. MANGES,
JACOB F. RASKIN,
of Counsel.